SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1329

EDWARD H. HYNES, *et al.*,

Appellants,

v.

THE MAYOR AND COUNCIL OF THE BOROUGH OF ORADELL, *et al.*,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS AND AFFIRM PURSUANT TO RULE 16

EVERETT I. SMITH,
Counsel for Appellees,
241 Main Street,
Hackensack, New Jersey 07601.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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Pursuant to Rule 16 (b) we move to dismiss the Jurisdictional Statement or to affirm on the ground that it does not present a substantial federal question. Alternatively, we refer to subsection (d).

Pursuant to Rule 40-3 there is no inaccuracy or omission in the statement supplied by the appellants and we are not dissatisfied with items (a) (b) (c) (d). We proceed at once to the merits.

POINT ONE

No substantial federal question is involved.

Appellants attack Ordinance #598 of the appellee (App. E-5). They assert the ordinance violates the free speech guaranteed by the First Amendment. We start first with what the ordinance does not preclude. So far as this ordinance is concerned the appellants, in a public place, can speak until they exhaust their breath and ideas, or the ears of the hearers rebel against the discordant din. They may stand on street corners and distribute literature. They may discuss with passing citizens and voters the merits of their respective candidates and/or cause and they may solicit signatures to their petitions. There is no censorship exercised over the views they espouse. Appellants want more. They want to move, unidentified, from house to house in this suburban community and harangue the householders. Some residents may embrace both the appellants and their cause, while others may feel they are sowing the seeds of a dangerous heresy. But whether welcome or not, appellants say they have this right and they bottom it on the theory of free speech. They put it more delicately on page 11 of their brief by saying they have the right to communicate face to face. It might be sufficient answer to say no one says to the contrary and certainly this ordinance does not prohibit it. All it does is say that people circumstanced as the appellants should identify themselves. There is nothing about the appearance of a candidate for public office, cartoonists aside, that distinguishes him from the rest of the populace. He does not wear the uniform of a postal carrier, a Western Union messenger, police officer, laundry man, or the like. Immediately the question arises: Why should not he make known his pres-

ence to the police authorities? Every day the news and electronic media convey items indicating the rape, murder and robbery of citizens in their own homes. We doubt if the perpetrators identified themselves as criminals before gaining admittance to the homes of the unfortunate.

Appellants cite no case, and we know of none, which asserts that the right of free speech justifies what otherwise would be a trespass.

> "If a man crosses his neighbor's boundary by however innocent a mistake, or if his cattle escape into his neighbor's field, he is said to be liable in trespass *quare clausum fregit.*" *Holmes' The Common Law,* p. 83.

In *Chase's Blackstone, Fourth Edition,* page 735, it is said:

> "• • • For every man's land is in the eye of the law enclosed and set apart from his neighbor's: and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field."

The State of New Jersey, *State* v. *Shack,* 58 N. J. 297 (1971) has extended the right of entry to representatives of agencies and organizations which assist migrant farm workers. This was on the analogy that these workers occupied the status of tenants. But even in that case the court said that the employer could regulate or bar solicitors or peddlers of all kinds so long as the regulation did not deprive the migrant worker of practical access to things he needed. The court concluded as follows at page 308:

> "And we are mindful of the employer's interest in his own and in his employees' security. Hence he may reasonably require a visitor to identify himself, and also to state his general purpose if the migrant worker has not already informed him that the visitor is expected."

In that case the constitutionality of the New Jersey Trespass Statute was questioned on the ground that the right of free speech guaranteed by the First Amendment was violated. The court discussed *Marsh* v. *Alabama,* 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946); *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.,* 391 U. S. 308, 88 S. Ct. 1601, 20 Law. Ed. 2d 603 (1966) and also *Schwartz-Torrance Investment Corp.* v. *Bakery and Confectionery Workers' Union,* 61 Cal. 2d 766, 40 Cal. Rptr. 233, 394 P. 2d 921 (Sup. Ct. 1964), *cert.* denied, 380 U. S. 906, 85 S. Ct. 888, 13 L. Ed. 2d 794 (1964).

The court said that these cases rested upon the fact that the property was in fact opened to the general public and hence the plaintiffs in those cases could not be barred from lawful activity on those premises. That these holdings were limited to citizens where the property was devoted to a public purpose is amply demonstrated by the decision of this court in *Lloyd Corp., Ltd.* v. *Tanner,* 407 U. S. 551 (1972) and *Central Hardware Co.* v. *N.L.R.B.,* 407 U. S. 539 (1972).

In *Goldberg* v. *Housing Auth. of Newark,* 38 N. J. 578 (1962) the State Supreme Court divided 4 to 3 on the question of whether the owner of a multi-family structure had a duty to provide police protection. In that case the plaintiff, while delivering milk to a tenant at defendant's housing project, was beaten and robbed by two

men. The attack occurred at about 1:30 P.M. in a self-service passenger elevator. Whether the assailants were tenants, guests of tenants, or intruders, is not known. The project had between 5300 and 6000 residents, embraced 19.15 acres of land and had 10 apartment houses, each 12 stories high. The majority ruled that the owner of multi-family structures had no duty to provide police protection. The police protection would have to be a private force. If we understand the appellants' argument, they would have the right to go through this project carrying their message and soliciting signatures, and if stopped by a private policeman simply state their mission and pass on. Appellants, say they, would be secure in the rights granted by the First Amendment. How, then, could a private police force protect the tenants and their invitees? Surely the two men who beat and robbed the plaintiff in *Goldberg, supra,* did not identify themselves as robbers. What benefit would a private police force be in a multi-family housing project if intruders, by the simple expedient of saying they were soliciting votes, could pass without identification? It is a well-known fact that apartment house owners advertise the presence of 24-hour doormen. It is also a well-known fact that tenants complain bitterly of the lack of security, as demonstrated by *Goldberg, supra.*

It is a well-known fact that freedom of speech is not an absolute right but subject to reasonable regulation. We need but cite *Cantell* v. *Connecticut,* 310 U. S. 296, 84 Law. Ed. 1213, 60 Supreme Ct. 900; *Breard* v. *Alexandria,* 341 U. S. 622 (1951); *Martin* v. *City of Struthers,* 319 U. S. 141; *Konigsberg* v. *State Bar of California,* 366 U. S. 36 (1961). These cases are, of course, in addition to *Marsh, Logan Valley, Lloyd Corp.* and *Central Hardware, supra.* The question, then, in each case is whether the regulation is reasonable or whether it is so

restrictive as to amount to an emasculation of the right of free speech.

The challenged ordinance is reasonable. The canvassers must identify themselves in the interest of the security of the householders. Once this is done there may be face-to-face dialogue between the canvassers and those interested in hearing their message. No embarrassing questions are asked of the canvassers; they are not required to be fingerprinted or photographed, nor is there any inquiry into their past history or membership in alleged subversive groups. As in all these cases competing principles strive for the mastery. With the right of privacy of the householder and his right to security, and his reasonable expectation that the police will provide that security, placed on one side of the scale, and the nebulous right of door-to-door canvassing on the other, we think the scale is weighed on the side of the householder.

The statute invoked by the appellants is permissive in nature. In *Eaton* v. *Price,* 360 U. S. 246, 79 Supreme Ct. 978, 3 Law Ed. 2d 1200 (1959) Justice Brennan stated that the court, in determining applications for leave to appeal from the state court, is governed by the same rules which it applies to applications for certiorari. There must be a reasonable showing of the substantial federal question, otherwise the court would be swamped with appeals. That we are not manufacturing dragons, we call attention to 5 *Bender's Federal Practice* at page 169 where the author says 50% of the applications are denied without argument.

For the reasons set forth above, this motion should be granted and the judgment of the Supreme Court of New Jersey should be affirmed.

Respectfully submitted,

Everett I. Smith,
Counsel for Appellees.